(3) defendants should be allowed unconditional leave to defend.

Case referred to.-

(1) *Lau Hee Teah* v. *Hargill Engineering Sdn. Bhd.* [1980] 1 M.L.J. 145.

APPEAL FROM REGISTRAR.

T.S. Chong for the plaintiffs/appellants.
S. Gunasegaran for the defendants/respondents.

Cur. Adv. Vult.

Yusoff Mohamed J.: This is an appeal against the Senior Assistant Registrar's decision under Order 14, Rules of the High Court 1980. I dismissed the appeal on these grounds.

The plaintiffs' claim is based on a Hire Purchase Agreement dated May 26, 1983, executed between themselves as owners and the 1st defendant as Hirer and the 2nd defendant as guarantor. The subject matter is one Aveling Barford Super MG 6x6 Road Grader bearing registration No. JAT 6854 (the vehicle).

The total hire purchase price was $71,584.50 payable by initial deposit of $18,664.50 and 24 monthly instalments of $2,205.00 each. The 1st defendant having defaulted in paying the instalments from September 3, 1984, onwards, the Hire Purchase Agreement was determined by the plaintiffs who repossessed the vehicle on November 17, 1984, and who finally sold it on September 11, 1985, some ten months later.

The plaintiffs then commenced this claim for loss suffered to the amount of $32,284.16.

The defendants in their Statement of Defence stated that the Hire-Purchase Act 1967 (Revised 1978) (the Act) applies and the plaintiffs have breached both section 16(3) and section 18(2) of the Act in that after repossession, no proper notice as to the estimated value of the vehicle was given by the plaintiffs to enable the defendants to obtain a third person to pay the plaintiffs the estimated value of the vehicle, and that the plaintiffs did not endeavour to get the best price for the repossessed vehicle.

The plaintiffs on the other hand contended in their affidavit that the Act does not apply as the subject matter does not fall within any of the categories of goods listed in the amendment to the 1st schedule of the Act.

The Senior Assistant Registrar considered *Lau Hee Teah* v. *Hargill Engineering Sdn. Bhd.*(1) The SAR found as a fact that the agreement is without doubt, a Hire Purchase Agreement where the subject is a vehicle and it thus raised an issue as to whether the Act applies to the present transaction. If it does, then all the ensuing remedies for breach of the Act would follow.

I am in agreement with the SAR's decision and additionally I also find that paragraphs 9 and 10 of the Statement of Defence also raised the issue that the vehicle was sold by the plaintiffs at below the market price and that it was unfair to the defendants.

The plaintiff's affidavit at paragraph 9 contended that the sale was effected at the best price in order to minimise the defendants' losses. Paragraph 8 of the affidavit stated that valuation fees were paid (and therefore valuation was taken). The plaintiffs did not, however, disclose the true valuation of the vehicle.

The defendants, in my opinion, are entitled to mitigate damages allegedly due from them. Having done this on behalf of the defendants, the plaintiffs are duty bound to act reasonably and responsibly and are actionable at the instance of the defendants.

For these reasons, in my view, the defendants should be allowed unconditional leave to defend.

Leave to defend allowed.

Solicitors: *T.S. Chong & Co.; Vincent Lai & Co.*

OOI SIEW YOOK & ORS. v. LIM BAR KEE

[O.C.J. (Edgar Joseph Jr. J.) February 6 & 20, 1987]

[Penang – Originating Petition No. 33-3-86]

Practice and Procedure – Consent order – Variation of consent order – Whether court has jurisdiction.

The issue in this case was whether the court has jurisdiction to vary a consent order made in respect of a family company. The consent order arose out of a petition filed by the company.

Held: varying the consent order, the court has jurisdiction to vary a consent order.

Case referred to:

(1) *Purcell* v. *F.C. Trigell Ltd. & Anor.* [1971] 1 Q.B. 358, 363, 364.

ORIGINATING PETITION.

K. Balasundram for the applicant.
Pamela Ong Siew Im (Miss) for the respondent.

Cur. Adv. Vult.

Edgar Joseph Jr. J.: The short but important practical point which arose for decision in this case was whether I should vary a Consent Order, dated July 25, 1986 arising out of a pending petition concerning a family company praying for numerous reliefs but not for winding up.

At the outset, I invited counsel to address me on the question whether I had the jurisdiction to vary the Consent Order in the particular circumstances of this case. I was satisfied that I had. It is not difficult to cite an array of cases to support this proposition; but, the following passage in the judgment of Denning M.R. in *Purcell* v. *F.C. Trigell Ltd. & Anor.*[1] will suffice:

"The plaintiff says that no appeal lies from an order made with the consent of the parties, except in circumstances in which a contract may be set aside or varied, such as mistake, misrepresentation, and so forth: and that this applies to interlocutory orders as well as to final orders. Mr. Hicks for the plaintiff relied in this regard on *Toder* v. *Sansam* (1775) 1 Bro. P.C. 468. I think that the plaintiff puts his case too high. I think that a party, who gets leave, can appeal from a consent order on wider grounds, at any rate in interlocutory matters. ... The court has always a control over interlocutory orders. It may, in its discretion, vary or alter them even though made originally by consent."

The background to this case can be stated in a few words: it follows a familiar pattern of disputes involving members of a family who have fallen out. They belong to two camps: the father, a prominent contractor in the construction field, in one, his wife and children in the other. At the time of presentation of the petition and, even now, the father owns only 6% of the shares in the Company concerned while his wife and children own 94%.

Allegations of fraud, in particular, misappropriation of funds and misuse of powers, have been freely made and each side is accusing the other of lying. Clearly, the truth can only be determined at the final hearing and after mature consideration. In the meanwhile, it is sufficient to say that manifestly the elements of trust and confidence, so essential to the proper running of any company have ceased to exist. So much for the background.

This brings me to the Consent Order which I mentioned in the opening paragraph of this judgment and the effect of which was that all cheques drawn on the company's current accounts with various banks in the city were to be signed by the father and his wife jointly.

Within a short while of the making of the Consent Order, the petitioners – who are the wife and the children – found that it was unworkable because they said that the father was unreasonably withholding his signature to various cheques intended as payment to creditors. They feared that if such a state of affairs were to continue, the business interests of the Company would be grievously wounded and the Company immobilised; most particularly, they were very concerned about a major Government contract for the construction of a bunded reservoir in Sabah. Obviously, the company has to expend money on work and labour and the purchase of equipment not to mention other things; this is essential if it is to fulfil its contractual obligations. It probably has overdraft at the banks. There are also the interests of the other party to this contract to be considered. On the other side of the coin, the father fears that if he loses his mandate to sign the company's cheques, he will lose control and, thus, be at the mercy of the petitioners. The problems posed are more human than legal.

It is not for me, at this stage of the proceedings, to go into the rights and wrongs of the matter; I have already said that that will have to await the final hearing.

After having given the fullest consideration to all the affidavit evidence, the exhibits annexed thereto and the submissions of counsel on both sides, in the exercise of my discretion, I varied the Consent Order, so that subject to the provisions of an indemnity, by the petitioners, in a form to be approved by the Court, then in default of the father signing the Company's cheques within one week of being required in writing so to do, the signatures of his wife and one of their two sons named in the prayer to this application would suffice. There was also liberty to apply.

Order accordingly.

Solicitors: *Balasundram & Co.; Lim Kean Siew & Co.*